HENRY F. TELFEIAN (CA SBN 081307)
EDWARD J. GODDARD (MA SBN 565975)
Kindred Healthcare, Inc.
1388 Sutter Street, Suite 605
San Francisco, CA 94109
Tel: (415) 544-3503
Fax: (415) 346-1351
Email: Henry.Telfeian@Kindredhealthcare.com

Attorneys For Employer
Kindred Healthcare, Inc.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

KINDRED HEALTHCARE, INC. Employer and. DISTRICT 1199NM NATIONAL UNION OF HOSPITAL AND HEALTHCARE EMPLOYEES, AFSCME, AFL-CIO Petitioner	)	Case 28-RC-6644

EMPLOYER'S BRIEF IN SUPPORT OF EXCEPTIONS TO HEARING OFFICER'S REPORT AND RECOMMENDATIONS TO CONDUCT AFFECTING RESULTS OF ELECTION

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I. PRELIMINARY STATEMENT

On August 7, 2009, Hearing Officer Johannes Lauterborn issued his report and recommendations on the three election objections filed by District 1199NM National Union of Hospital and Healthcare Employees, AFSCME, AFL-CIO (hereinafter "Union") to an election conducted at a long term acute care hospital operated by Kindred Healthcare, Inc. (hereinafter "Kindred"). The Hearing Officer sustained two objections while overruling a third and recommended that a new election be held. In doing so, the Hearing Office essentially acted in a lawless fashion (1) by disregarding settled Board law, (2) by creating new law in contravention of Board precedent; and (3) by sustaining an objection that was never alleged or litigated. Indeed, what is shocking is the Hearing Officer's failure to cite a single Board case supportive of any of his critical conclusions and his willingness to deprive Kindred of its due process right to defend itself by sustaining an objection that was not even tangentially referenced in the record evidence or argued by any party.

A Hearing Officer, of course, acts as the Board's representative. A Hearing Officer has no right or authority to create Board law, no less ignore or overrule Board law. A Hearing Officer is obligated to make credibility determinations and is then duty-bound to apply extant Board law to the found facts. A Hearing Officer, who fails to cite a single Board case to support his critical conclusions while simultaneously ignoring contrary precedent, flouts his obligations to the Board and to the parties. That is precisely what occurred in this case.

II. THE OBJECTIONS

On April 1 and 3, 2009, pursuant to a Stipulated Election Agreement, an election in a "wall-to-wall" unit including professional and non-professional employees was held at Kindred's hospital in Alburquerque, New Mexico. Of the approximately 125 eligible voters, 68 voted "No" and 30 voted for representation.[1] Thereafter, the Union filed three timely objections, and by Order dated April 29, 2009, the Regional Director concluded that the three objections raised substantial and material issues of fact and ordered that a hearing be held on the following three objections (emphasis omitted):

1. The election was conducted in circumstances where the Respondent [Employer] restrained and coerced Kindred employees in violation of the Act. Specifically, the Employer, in written and verbal communications, threatened to close down the facility if the employees elected the Union as its collective bargaining agent. Specifically, the Employer made written representations to employees that, "Many Kindred union facilities have closed or been sold in the past few years." (emphasis in original document.) These representations were made to the employees during the critical period.

2. The election was conducted in circumstances where the Respondent restrained and coerced Kindred employees in violation of the Act. Specifically, the employer, in written communications posted at the time clock, directed employees to vote No. The communications were posted at the time clock to make the implicit threat that employees would lose their jobs if they did not vote against the Union. These actions by the employer were conducted during the critical period.

3. The election was conducted in circumstances where the Respondent restained and coreced Kindred employees in violation of the Act. Specificallly, the Employer, on at least one occasion, took efforts to conduct surveillance of employees engaged in conversation with Union representatives. These actions by the employer restrained and coerced Kindred employees in a threatening manner.

[1] There were approximately 40 professional employees who voted 16 to 8 to be included in the non-professional unit, and their votes were commingled with the non-professional employees.

The Hearing Officer sustained the first and second objections while overruling the third.[2] However, from the outset it is critical to emphasize that the Hearing Officer sustained the second objection on a factual basis *different* than the objection alleged. The Hearing Officer sustained the second objection "[b]ecause the Employer's altered sample ballot was written in English but not Spanish, this [altered] ballot was not an actual reproduction of the Board's sample ballot, which was written in both English and Spanish … therefore, the Employer's posting of the fliers with the altered sample ballots is objectionable conduct." (Report, p. 15).[3]

As is self evident, ***the second objection makes no reference whatsoever*** to the sample ballot posted by Kindred nor does it in any way assert that Kindred's *alleged* failure to post a Spanish language altered ballot constituted objectionable conduct. Rather, the second objection asserts that the objectionable conduct consisted of Kindred's posting of a "Vote No" poster in *proximity to the employees' time clock,* thereby, *impliciting* threatening employees with termination. The Hearing Officer deprived Kindred of its constitutional due process right to notice and prevented Kindred from presenting a defense by sustaining an objection based on conduct that was neither alleged to be objectionable nor litigated.[4]

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[2] Because the third objection was overruled, further discussion regarding this objection is unnecessary.

[3] "Report" refers to the Hearing Officer's Report and Recommendations on Objections To Conduct Affecting Results of Election issued on August 7, 2009. "Tr." refers to the hearing transcript followed by a page reference. "UX", "EX", and "HOX" refer to Union Exhibits, Employer Exhibits, and Hearing Officer Exhibits, respectively.

[4] Because this "post-hearing created objection" was neither charged nor litigated, there is no evidence in the record as to whether Kindred did, or did not, post such a Spanish version altered ballot. (See discussion *infra*, pp. 26-29.) The Hearing Officer, in order to support his own objection, *conveniently assumed* that Kindred did not post such a sample ballot but the record is silent on this point. An assumption does not constitute evidence. Thus, even if the objection were considered, it would fail for lack of evidence.

III. ARGUMENT

A. KINDRED MADE AN ISOLATED, 100% FACTUALLY CORRECT STATEMENT THAT IT HAD CLOSED OR SOLD VARIOUS FACILITIES AND SUCH A TRUTHFUL STATEMENT DOES NOT CONSITITUE AN EXPLICIT OR IMPLICT THREAT NOR A PREDICTION OF FUTURE CONDUCT.

Although Objection No. 1 alleges that Kindred made written and verbal threats to close the facility, in truth, and as acknowledged by the Hearing Officer, there is only one such statement at issue. *Prior to the filing of Union's representation petition*, Kindred distributed a *two-page flier* to the employees entitled "THE TRUTH ABOUT UNION CARDS". (Report p. 4.)[5] One of the paragraphs in this flier read as follows:

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[5] Based on his credibility determinations, the Hearing Officer concluded that this pre-petition document was posted on hospital bulletin boards *during* the critical election period. (Report, p. 9.) Because ultimately the Hearing Officer's credibility determinations on this issue are non-determinative, Kindred will not devote any significant portion of these Exceptions to that issue. However, the Hearing Officer deliberately mischaracterized the record to support his conclusion by finding that the flier was not received at the hospital nor distributed or posted until February 16th -- 5 days after the "R" petition was filed. (HOX 1; Report, pp. 7-8.) *The documentary evidence* showed that this flier was sent via email to the hospital on January 16th. (EX 14.) The uncontradicted testimonial evidence was that the relevant management meeting occurred on or about January 16th and the flier was distributed *at that time*; not a month later. (Tr: 437-440, 526, 529, 546, 560.) Additionally, the flier went out under the name of Sandra Yule, the hospital CEO, who was at the hospital on January 16th *but no longer employed in mid-February*. (Tr: 234, 437.) No record evidence contradicts these facts, nor did the Hearing Officer discredit this evidence. Indeed, any contrary conclusion would be absurd. No employer would distribute a flier encouraging employees not to sign union cards five days *after* a "R" petition had been filed – what would be the point? By choosing to misstate the date by a month, the Hearing Officer makes it seem as if the flier was *primarily* distributed during the election period when it was actually distributed almost a month *before* the "R" petition was filed. If the flier also happened to be posted during the critical election period, it was only due to happenstance inasmuch as its contents were irrelevant to the election campaign.

What is equally strange was the Hearing Officer's decision to credit the testimony of union organizer Henry Santana that this flier was posted by the time clock bulletin board on the days of the election, April 1 and 3. (Report, p. 8.) Margie Serna, a union supporter, took pictures of that same bulletin board during the election week and the flier does not appear in any of the pictures. (Tr: 315-316, 501, 503; UX 8.) Indeed, Santana's detailed description of the "cluttered" time clock bulletin board (Tr: 129, 170) is disproved by Serna's photograph (UX 8), and yet the Hearing Officer credited Santana's description. Apparently, for the Hearing Officer, this is not a case where a picture is worth 1,000 words. (*continued on next page*)

"Why do I care whether a union gets in here?

Bringing a union into a hospital has often been a bad deal for Kindred employees. To get you to sign, the union only tells you what it thinks you want to hear (they are trying to "sell" you on their union!). The truth is often a lot different. For example, did you know:

- **Unions cost money:** You would have to pay monthly dues to the union. Many unions charge a percentage of your wages as their dues – some as much as 2.5%.

- You must obey union rules and regulations and can be fined for violating them;

- You can be ordered out on strike (the SEIU union took 50 nursing homes, including Kindred, out on strike in Connecticut in 2001);

- Many **Kindred union** facilities have closed or been sold in the past few years (1 closed in California, 1 sold in California; 2 closed in Connecticut; 2 sold in Massachusetts; 1 sold in Wisconsin; and 3 sold in Florida).

- Unions usually want to use seniority over merit in deciding promotions."

(Report, p. 4; UX1.) (Original Emphasis.)[6]

The Hearing Officer found that the fourth bullet point in this flier, *standing alone*, constituted a threat to close the hospital if the employees selected the Union as their

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Having credited Santana's testimony that the flier was posted on the time clock bulletin board on April 1 and 3, the Hearing Officer then reached a completely *contrary conclusion*, on the same page of his Report, holding: "Based on my review of the record as a whole, including my observations of the witnesses, I find that from about late February 2009 until about mid-March 2009, the "truth" flier was posted on the uncovered bulletin boards above the time clock and in the ICU as well as on the glass-encased bulletin boards adjacent to the time clock and in the nursing office." (Report, pp. 8-9.) Apparently, contrary to Santana's credited testimony, the flier was not posted on April 1 and 3 on the time clock bulletin board. The Hearing Officer's findings are self-contradictory.

[6] The flier also stated: "Kindred Hospital neither encourages you nor discourages you from taking any specific action. The decision to sign a card, not sign a card, or revoke a signed card is yours, and yours alone. No action will be taken for, or against you, regardless of what you do…." (UX 1.)

representative. (Report, p. 12.) However, *there can be no dispute that the statement is 100% accurate and constitutes a truthful statement concerning what occurred at Kindred "in the past few years"*. Testimony from Kindred's Vice-President of Labor Relations established that from 2004 to 2008, Kindred closed one facility in California; closed two facilities in Connecticut; and sold one facility in California; sold two facilities in Massachusetts; sold one facility in Wisconsin; and sold three facilities in Florida. (Tr; 392-394, 404.) At each of these facilities, a union represented the employees at the time of the sale or closure. (Tr: 394.)[7]

By themselves, the words in this sentence obviously contain no express or explicit threat. There is no prediction that Kindred Hospital will close or be sold if the union becomes the employees' representative. But, just as surely, there is no implied threat. Nothing in the statement indicates or implies that a similar result would occur at Kindred Hospital Albuquerque if the employees selected a union as their representative. Indeed, *in context*, it is quite obvious that the "closure statement" is just a very small part of a much larger message and, even more significantly, the statement appears in that part of the document that lists various "facts" about unions.

Any reader would understand the statement *in this context* as nothing more than a factual statement not as a threat of Kindred's future response to unionization. The document was *not* accompanied by any oral communication or written material that could be construed as

[7] The Hearing Officer's "result oriented" bias is demonstrated by his "grudging" acknowledgement that the statement was factually true when he stated "… it may be a 'fact' that many Kindred union facilities have been closed or sold…" (Report, p. 11.) There was no "may" about the truthfulness of the statement. The record evidence was clear and uncontradicted that the statement was 100% factually correct. Indeed, Kindred's Vice-President of Labor Relations, Ed Goddard, was required to fly across the country to testify as to the facts that demonstrated that the statement was 100% truthful. (Tr: 426.) The Hearing Officer's refusal to candidly acknowledge the obvious is indicative of his desire to reach his result irrespective of the record evidence.

having giving the statement any "implied" or "hidden" meaning. Quite to the contrary, this one bullet point *is the only reference* to sales or closures in this Kindred document *or any campaign document at any time*.[8] Although the Hearing Officer makes no reference to the context in which this statement was made, the Board and Courts have long held that such statements must be viewed in context. *E.g*., *UARCO, Inc*., 286 NLRB 55, 58 (1987) and *NLRB v. Virginia Electric & Power Co*., 314 U.S. 469 (1941). Moreover, this was a document distributed in January as part of Kindred's *pre-petition campaign*. It was not distributed as part of the union campaign. Assuming *arguendo* that the Hearing Officer is correct that the flier remained posted on hospital bulletin boards, it would have had no particular significance. Indeed, Kindred posted many, many fliers as part of the campaign and distributed other fliers to its hospital employees. (UX 2, 3, 4; EX 2, 3, 4, 5, 6, 7, 8, 9, 13; Tr: 459-477, 499-500, 530-533.) *None of these other documents referenced "closures or sales"*. So as a practical matter, there is no reason why this pre-petition flier, and the one paragraph within it, and the one sentence within the one paragraph, would have been viewed with particular significance or importance during the election campaign. Other than its original pre-petition distribution in January, it was never distributed again. Being one flier, among many, posted on a bulletin board, covered with campaign material, would not give it any particular prominence.

Even ignoring the isolated nature of the statement, *the Hearing Officer does not cite a single Board case holding that such a factual statement, unaccompanied by any other statement, constitutes an implicit threat*. Instead, he makes a generic reference to the Supreme

[8] It also bears noting that Kindred's statement references the closure of only three facilities while simultaneously stating that another 7 facilities were sold. Objection 1 asserts that Kindred threatened to "close down" the facility; not that Kindred threatened to sell the facility. In his Report, the Hearing Officer failed to make this distinction. A sale of a facility is markedly different from a closure.

Court's decision in *NLRB v. Gissel Packing Co*., 395 U.S. 575 (1969) holding that it is unlawful to *predict* plant closure without disclosing the objective basis for the prediction. Then, using the Supreme Court's holding concerning a "prediction" of plant closure, the Hearing Officer, *in contravention of existing Board precedent*, expands that holding to conclude that a factual statement concerning *past events must* also detail the underlying basis for the employer's past conduct, or the statement will be deemed to be a threat. The Hearing Officer stated:

> "Although it may be a 'fact' that many Kindred union facilities have been closed or sold, the isolation of this fact, and *the omissions of other facts*, such as whether non-union Kindred facilities have been closed or sold, what circumstances prompted the closures or sales, and whether the decision to close or sell the facilities was 'beyond management's control or a management decision already arrived at in case of unionization' *results in a 'threat* of retaliation based on misrepresentation and coercion'."
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> (Report, p. 11.) (emphasis added.)[9]

Totally lacking from the Hearing Officer's holding is any case citation that holds that a factual statement concerning past closures *becomes* a threat if unaccompanied by "explanatory" facts. The reason that the Hearing Officer cannot cite such a case is because the Board has repeatedly held (1) that such factual statements do not constitute threats; and (2) that an

[9] To buttress his faulty reasoning the Hearing Officer mischaracterizes the record by asserting that Kindred "isolated" the statement – thus presumably giving it special importance. According to the Hearing Officer: "…the isolation of this fact and the omissions of other facts… results in a threat…" (Report, p. 11.) The record is to the contrary. The document was first distributed in mid-January 2009; more than a month before the "R" petition was filed. (Tr: 437-438, 526, 529, 546; EX 14.) The reference to "closures" was one sentence in a dense two-page document. (UX 1.) When the campaign began in February, Kindred distributed and posted fliers on a weekly basis – none of which ever referenced sales or closures. (UX 2, 3, 4; EX 2, 3, 4, 5, 6, 7, 8, 9, 13; Tr: 459-477, 499-500, 530-533.) Clearly, Kindred did not emphasize or stress this statement. It was merely a throw away statement in a pre-petition document which, accepting the Hearing Officer's credibility resolution, some how remained posted during the election campaign even though it had no relevance to the campaign because it was directed to convincing employees not to sign authorization cards.

employer is under no obligation to "explain" past conduct.

1. Truthful Statements Of Past Facility Closures Do Not Constitute Threats.

In *Smithfield Foods, Inc*., 349 NLRB 1225 (2006), the plant manager, in a *captive audience speech*, told the employees to remember that "this building has been unionized three times by UFCW [and] it has closed its doors three times and the UFCW could do nothing to keep it open." A few weeks later the plant manager again told the employees that the plant had closed three times in the past. Then, still later, the plant manager told the employees: "Don't hang the UFCW around this plant for a fourth time; you have the chance to learn from the mistakes of the employees who lost with the UFCW three times before." *Id*. at 1226. Significantly, the employer did not set forth any additional explanatory facts.

Nonetheless, the Board easily concluded that such statements did not contain a threat but simply constituted a factual recitation stating: "We find no threat in Respondent's statements. Instead we find that the Respondent provided employees with relevant, factual information about the Union's history at the facility. … Employers have a right to point to a union's past failures and to use them to encourage employees to vote against the union, just as a union may point to its past successes to encourage employees to support it." *Id*.[10]

Of course, *Kindred did nothing more*. It, too, pointed out *its* history with unions. Employees often believe that unions provide them with job security. Kindred had a right to point out that unions do not "guarantee" that a facility will remain open or will not be closed or sold. That is precisely the message that can be garnered from Kindred's factual statement.

[10] The Hearing Officer's Report makes no reference to *Smithfield Foods, Inc.*, no less distinguishes it – even though it involves a "captive audience" speech where the emphasis on the closure issue was far greater.

Nothing in Kindred's statement indicates that selecting a union would cause the closure of Kindred Hospital Albuquerque.

Similarly, in *Stanadyne Automotive Corp.*, 345 NLRB 85 (2005), the employer at a "captive audience" meeting described in detail the results of a possible bargaining impasse, including the likelihood of a strike and possible strike violence, and then concluded by displaying a large sign of "seven photographs of closed plants" with the legend: "These are just a *few* examples of plants where the UAW *used* to represent employees." (original emphasis). 345 NLRB at 88. Then across each of the seven photographs the employer put the word "CLOSED" in large red block letters with the date of each plant closure. *Id*. Finally, the bottom of the sign read: "Is this what the UAW calls job security? VOTE NO!" *Id*. Copies of this sign were used at the meeting and displayed throughout the plant during the week before the election. The Board held:

> "Subsequent cases applying this [*Gissel*] standard involve fact intensive analyses of the circumstances involved. In *EDP Medical Computer Systems, Inc.*, 284 NLRB 1232, 1264 (1987) (citing *Michael's Markets*, 274 NLRB 826 (1985)), the employer's display of a poster entitled, "Is this job security?" depicting companies that had closed as a result of unionization, and the employer's remarks about these facts at meetings, were found to be lawful. In so finding, the Board held that neither the poster nor the employer's remarks suggested that the employer would close if the union came in, and that the employer had a "right to give employees information with respect to industry conditions, and was merely stating 'economic reality' by informing employees of these events."
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> Applying this precedent, we find, contrary to the judge, that the Respondent's conduct during the June 21 meetings was lawful. *By conveying events that had already occurred*, as well as supplying the perspective of employees who had experienced some of those events, the speeches and the "closed" sign merely attempted to inform employees of the potential negative effects of

> their upcoming vote. As stated above, an employer's right to communicate its "general views about unionism" or "specific views about a particular union," absent threats or promises, is well established. *Gissel*, 395 U.S. at 618."
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> 345 NLRB at 85. (emphasis added.)[11]

In *UARCO, Inc*., 286 NLRB 55 (1987) the employer referenced a plant that it operated in Cleveland and stated "if it hadn't been for the outside union, we probably wouldn't have been forced to close the plant" and then went on to say: "The Company is now threatened by the UAW, which has a sad record of closing plants in Kentucky and forcing plants to leave Kentucky". *Id*. at 57. Like the Hearing Officer in this case, the ALJ found that "on their face" that the employer's statements were neither false nor threatening, but the ALJ concluded that the statements were unlawful because they lacked an "explanation" and thus were unsupported by "demonstrable evidence". *Id*. The Board had no problem *overruling* the ALJ holding: "Mere references to the possible negative outcomes of unionization, however, do not deprive the Respondent's materials of the protections of Section 8(c)." *Id*.

[11] The Hearing Officer sought to distinguish *Stanadyne* on the basis that "virtually all of the owned facilities were owned by an employer other than the employer involved in the election". (Report, p. 12.) Such a distinction is bizarre because the Board would be holding that employees who are told about another employer's closures need not be given explanatory facts because those employees are apparently able to "handle" the implied threat while employees told about their own employer's closures would be given such facts because they apparently cannot. Clearly, such a distinction makes no sense. Regardless, the Board has rejected the distinction. In establishing this distinction, the Hearing Officer ignored, and failed to distinguish, the other cases cited by Kindred such as *Smithfield Food*, *supra,* where the Board found similar factual statements made by other employers, *concerning their facilitie*s, to be lawful. (See discussion *infra*, pp. 17-20.) Moreover, in *Stanadyne*, as well as the other cited cases, the employers involved made much more expansive statements regarding plant closures than the single "throw away" statement made by Kindred; yet the Board found such statements to be lawful. In *Stanadyne*, for example, the employer made the statements at a captive audience presentation and *emphasized the closures as the principal focus of its presentation*.

The simple truth is that the Board has never held that a pure factual statement as to past closures – *by itself* – constitutes a threat or objectionable conduct. *See also EDP Medical Computer Systems, Inc*., 284 NLRB 1232, 1264 (1987) (displaying a poster showing three union facilities that had been closed with the caption "Is This Job Security" and referencing the closures at a campaign meeting is not an implied threat).

The Hearing Officer here seemingly believed, *again without providing any case authority*, that because an employee could *infer* a threat, a threat exists stating: "Implicit in the Employer's statement is a suggestion that unionization might result in the closure or sale of the Employer's facility involved in the instant petition." (Report, p. 12.) However, the Board has rejected such an analysis finding that employees are "free to draw their own inference of causation or not to do so". *Stanadyne Automotive, supra*, at 89; and see *also Liquitane Corp*., 298 NLRB 292, 297 (1990) ("Whatever, one might think of the implicit message of his speech, I do not think that Skirboll's statements [regarding plant closures]…constitute a violation of law or grounds for setting aside the election.")

Ultimately, then, the Hearing Officer concluded that (1) a concededly 100% factual sentence, (2) in a two page complex pre-petition document discussing union authorization cards, (3) standing alone without any other oral or written campaign communications referencing closures or sales made at any time during the campaign, (4) setting forth Kindred's recent history with its union facilities, constituted a threat. Board law is flatly to the contrary.[12]

[12] Although not dispositive, when assessing the effect of an alleged threat on an election, the vote count (in this case 68 to 30) in relation in the general atmosphere under which the election is conducted is relevant in determining whether a threat interfered with the election. *See Accubuilt, Inc*. 340 NLRB 1337 (2003). Here, the overall atmosphere of the campaign and Kindred's overwhelming victory were not tainted by one pre-petition flier containing a 100% truthful statement referencing Kindred's past union history. Even if Kindred's one sentence

2. The Omission Of Some Facts Does Not Convert A Truthful Statement Into A Threat And Kindred Was Not Required To Detail All The Facts Surrounding Its Closures.

Faced with this Board law and the lack of any case holding that such a purely factual statement constitutes a threat, the Hearing Officer decided to create new law. The Hearing Officer held that Kindred's truthful statement (which on its face contained neither an express or implicit threat) *became* an unlawful threat because Kindred omitted telling the employees (1) whether non-union facilities had also been closed or sold, (2) the circumstances that prompted any closures or sales, and (3) whether the closures and sales were beyond management's control or due to unionization. (Report, p. 11.) Moreover, the Hearing Officer chose to apply this standard only to employers who make statements about their own facility closures or sales. *Id*.[13]

Yet, again, the Hearing Officer fails to cite a single Board case to support his novel extension of Board law. Not only is the Hearing Officer attempting to make new Board law, but in truth, he is ignoring existing Board cases holding that there is no affirmative obligation to "disclose" facts. In crafting his test, the Hearing Officer ignores the significant policy implications of his decision. Under the Hearing Officer's test, instead of reviewing what an employer says, the Board will be required to judge what an employer *could have, or should have*, said. For good reasons, the Board has refused to enter into such a quagmire, and the

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statement was deemed an implied threat, it played no meaningful role in the campaign and would not have influenced such an overwhelming vote against the union.

[13] According to the Hearing Officer, this affirmative obligation is imposed on Kindred because: "The Employer is not reporting on what occurred at facilities owned and operated by others, where an explanation of why the facilities closed may be unavailable and accordingly left to the speculation of the employees, the Employer is discussing actions taken by the Employer at its facilities." (Report, p. 11.)

Hearing Officer erred in ignoring Board law and adopting his own test for what constitutes a threat. [14]

The Board has repeatedly refused to impose a requirement on employers to affirmatively disclose facts. A factual statement concerning plant closures does not become a threat because an employer does not detail the reasons for the closure. As most recently held in *Stanadyne Automotive Corp*., *supra*:

> For this reason, our colleague's complaint that the Respondent's speakers did not establish an objective basis for their assertions that the Union had caused plants to close misses the mark. The Respondent's speakers did not claim that the Union had caused any plants to close. *Rather, they simply recited the facts that these were unionized plants and that they had closed. Employees were free to draw their own inference of causation or not to do so*. That judgment was left to them. Further, even if employees drew the inference of Union causation, that would not suggest to those employees that the closures were volitional retaliatory acts by the Respondent.
>
> 345 NLRB at 89. (emphasis changed and footnote omitted.)

If a statement is plainly accurate, the fact that other facts are omitted does not turn it into a threat. *See also Gold Coast Produce*, 319 NLRB 202 (1995) ("The events referred to by Ray had occurred many years before, however, he did not acquaint the assembled employees of this when speaking to them.")

[14] The instant record demonstrates some of the pitfalls in the Hearing Officer's test. The Hearing Officer would require Kindred to disclose "whether non-union Kindred facilities have been closed or sold…" (Report p. 11.) Yet the only evidence in this record is that there were no such closures. (Tr: 408, 410, 415, 422.) Was Kindred therefore required to disclose that there were no such closures? The Hearing Officer does not say. Once the Board goes down this route, there is no end to what a losing party might assert that the winner should have disclosed, but did not. It is for that reason, among others, that the disclosure obligation is limited under *Gissel* to situations where an employer *predicts* that it will close a facility in response to unionization. That did not occur here.

As previously noted, the Hearing Officer sought to distinguish *Stanadyne* on the basis that the employer was not discussing its own plant closures. However, the Board has not applied such a disclosure requirements even when employers discuss their *own* facility closures. Thus, in *UARCO, Inc*., *supra*, the Board overruled an ALJ who had held that an employer's factual statement became a threat because the employer had failed to explain why it had closed its plant in Cleveland. 286 NLRB at 57.

Similarly, in *Smithfield Foods, Inc*., *supra*, -- a case that the Hearing Officer did not discuss no less distinguish -- the employer, in a *captive audience speech*, told the employees to remember that "this building has been unionized three times by UFCW [and] it has closed its doors three times and the UFCW could do nothing to keep it open" – a far harsher and potentially more intimidating statement because it involved the facility where the election was to be held. Yet, the Board found this statement to be lawfully protected speech and did not impose any sort of affirmative obligation to disclose to the employees the reason why the facility had closed.[15]

For good policy reasons, which this Hearing Officer ignored, the Board concerns itself with *affirmative misrepresentations*, not omissions, and the Board has never imposed an affirmative obligation to disclose "additional" facts. Indeed, the Board's position was succinctly summarized by the Fifth Circuit in *Florida Mining & Materials Corp*., 481 F.2d 65 (1973) *enf*. 198 NLRB 601 (1972):

> "The Board seeks to frame the issue posed by this case more precisely. It is their contention that the company is seeking to have the Board adopt a totally new standard which it has never considered in the past. The Board maintains that the only way to cast

[15] As the Board recognized in *UARCO, Inc*., *supra*, Section 8(c) of the Act protects an employer's right to make factually correct statements. To impose an affirmative obligation that a factually correct statement must also include "explanatory" facts – as judged by the Board – would undercut Section 8(c). For that reason, the obligation to make such explanatory statements has been limited to predictions, not statements of fact.

> a suitable rule for this situation would be to inject an 'affirmative disclosure' requirement. As the Board points out, such a rule has never been formulated or imposed in any reported case.
>
> The Board argues strongly against such a rule. Its primary reliance is bottomed on the assertion that such a rule would create an unbearable administrative burden in return for only marginal benefit. The Board points out the great difficulty in determining the scope and extent of an affirmative disclosure rule. They suggest that losing parties would be quick to take advantage of any such rule in an effort to avoid the consequences of a free election. In short, they seek to avoid endless litigation on a case by case basis as to what may or may not have been material and what may or may not have been subject to disclosure."

In crafting his rule, the Hearing Officer simply disregarded the Board's policy choice. Section 8(c) of the Act entitled Kindred to make the factual statement it did. The Hearing Officer committed serious error in choosing to contravene established Board law by imposing a new requirement on employers in election cases. Merely because Kindred could have chosen to disclose additional facts about its closures and sales does not convert the truth into a threat. Simply put, "what could have been said" is not the relevant test. What was said, is![16]

Kindred's statement *should have been* evaluated within the "total context" in which the statement appeared. *NLRB v. Gissel Packing Co., supra*. Here, the context commands the conclusion that no implicit threat can be found in such an isolated statement about sales and closures. The statement is 100% truthful statement concerning past conduct. The statement appears as one line in a complex two-page document. The document, even if posted during the critical period, is clearly a document directed to pre-petition conduct, distributed primarily prior to the filing of the "R" petition, and not intended to influence the vote. In fact, in this same document, Kindred made it clear that the decision whether or not to support the Union rested

[16] Plainly stated, the Hearing Officer confused the *Gissel* standard involving an employer's obligations where the employer predicts a *future* closure (in which event there is an affirmative disclosure obligation) from the cases where an employer simply sets forth facts involving *past* conduct (in which case there is no affirmative disclosure requirement but rather an obligation to be truthful).

solely with the employees and not with management. (UX 1.) There is no evidence that Kindred ever referred to closures or sales *at any other time* during the election campaign in either its oral or written communications. Employees were given numerous fliers throughout the course of the six-week campaign *burying* this pre-petition document in a blizzard of campaign material. (UX 2, 3, 4; EX 2, 3, 4, 5, 6, 7, 8, 9, 13; Tr: 429-430, 529-533.) *The Board has never found such an isolated, totally factual statement, concerning past conduct to constitute an implicit threat of closure*. The Hearing Officer erred in sustaining this objection in contravention of Board law.

B. BECAUSE THE ALLEGED OBJECTIONS DID NOT CLAIM THAT KINDRED FAILED TO POST A SPANISH VERSION OF THE ALTERED NLRB BALLOT AND BECAUSE THE ISSUE WAS NEVER LITIGATED, THE HEARING OFFICER DENIED KINDRED ITS CONSTITUTIONAL DUE PROCESS RIGHTS IN SUSTAINING AN UNLITIGATED AND UNALLEGED OBJECTION, AND IN ANY EVENT, THERE WAS NO EVIDENCE TO SUPPORT THE RECAST OBJECTION.

The second stated objection asserted that Kindred in written communications posted at the time clock, directed employees to vote No and thereby made the implicit threat that employees would lose their jobs if they did not vote against the Union. There is no dispute that Kindred posted fliers on the bulletin board above the time clock asking employees to "Vote No". However, it does not constitute objectionable conduct for an employer to post campaign material near a time clock asking employees to vote no. That has been Board law for over 50 years. *Independent Nail and Packing Company*, 120 NLRB 677, 678 (1958); and *see also Beverly Enterprises-Hawaii, Inc.*, 326 NLRB 335, 336 (1998)

The objection was frivolous and never should have been alleged, no less litigated. Having been fully litigated, it should have been overruled. But, the Hearing Officer *never addressed the alleged objection in his Report*. Instead, he rewrote it *sub silentio*, and then

sustained his rewritten objection although (1) Kindred was never given notice that a new objection had been added; (2) Kindred never litigated the issue or discussed it in its post-hearing brief; and (3) no party ever referenced the issue at the hearing.

The objection, as rewritten by the Hearing Officer, alleges that Kindred engaged in objectionable conduct when it posted an altered Board sample ballot containing the "NLRB disclaimer" language in English but failed to also include a Spanish language disclaimer.[17] Because the official sample ballot was in both English and Spanish, the Hearing Officer, relying on *Foster Poultry Farms*, 352 NLRB 1147 (2008), held that Kindred's failure to include a Spanish language disclaimer was objectionable conduct.

Aware that the issue of the existence of a Spanish version of the NLRB disclaimer language, or the lack thereof, (1) was not referenced in the Regional Director's Hearing Order, (2) was not referenced at the hearing by any party, (3) was not referenced at the hearing by the Hearing Officer, and (4) was not referenced in Kindred's post-hearing brief, the Hearing Officer made an anticipatory ruling:

> "To the extent that the Employer argues that it was denied due process because the wording of Objection 2 failed to provide it with meaningful notice that the absence of Spanish text in the altered sample ballots would be alleged as objectionable at the hearing, I reject this argument. Although Objection 2 does not specifically identify altered sample ballots, the issue of their absence is reasonably encompassed within the scope of the objection, which states, that 'the employer, in written communications posted at the time clocks, directed employees to vote No.' The two sample ballots were contained within two fliers that the Employer indisputably 'posted' on a bulletin board 'at' the time clock, with the intention of communicating the fliers message to as many employees as possible. The Board disclaimer at the bottom of each sample ballots is irrefutably a 'written communication', and two of the three boxes on the sample ballot are marked "No". *The Employer was thus on notice that it would have to defend against allegations that the fliers that it posted near the time clock that directed employees to vote against the Union were unlawful*. …. I find that the altered ballots

[17] The Board requires any altered sample ballot to include this disclaimer: "The National Labor Relations Board does not endorse any choice in this election. Any markings that you may see on any sample ballot have not been put there by the National Labor Relations Board." *Ryder Memorial Hospital*, 351 NLRB 214, 216 (2007).

> are reasonably encompassed in Objection 2 and that *the issue was fully litigated at the hearing*."
>
> (Report, p. 15 n. 7.) (emphasis added.)[18]

It is difficult to conceive of a more disingenuous finding. According to the Hearing Officer, Objection 2 was sufficiently broad that Kindred was required to defend against *any issue* arising from *any flier* it posted *near the time clock* which asked employees to "vote No".[19] If a claim could be made that a "vote NO" flier posted *near the time clock* was unlawful *for any reason*, Kindred was required to foresee that such a claim *might* be made. Kindred was required to defend against any such claim – even though Objection 2 expressly said, and even used the word "specifically" to assert that the objection was that Kindred made an "implied threat" of termination because of the proximity of its "vote No flier" to the time clock, to wit:

> "*Specifically*, the employer, in written communications posted at the time clock, directed employees to vote No. The communications *were posted at the time clock to make the implicit threat that employees would lose their jobs* if they did not vote against the Union.
>
> (Report, p. 3.) (emphasis added.)[20]

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[18] By making this ruling, the Hearing Officer denied Kindred the opportunity to argue the point or brief it. The Hearing Officer rejected an argument that Kindred was not even given the opportunity to make. Yet, another denial of Kindred's due process rights.

[19] All of Kindred's campaign fliers were posted on the time clock bulletin board, and almost all asked employees to "vote no". (Ex 2, 3, 4, 5, 6, 7, 8, 9 and 13; Tr: 429-431.) According to the Hearing Officer, based on the wording of Objection 2, Kindred should have been prepared to defend the lawfulness of each such flier regardless of the basis upon which it was claimed – *after the hearing concluded* - that the flier was unlawful.

[20] The fallacy of the Hearing Officer's reasoning is easily demonstrated. Appeals to racial prejudice may, under some circumstances, constitute objectionable conduct. *E.g.*, *Sewell Mfg. Co*., 138 NLRB 66 (1962). Under the Hearing Officer's rationale, if Kindred had posted a "vote no" flier *near the time clock* that contained a racial appeal, Kindred was required – *under the wording of Objection 2* – to defend against the possibility that such a flier was unlawful even though Objection 2 makes no reference to the racial nature of the flier. Kindred would be required to defend against such an allegation even though no party nor the Regional Director nor the Hearing Officer ever raised the claim.

It is well settled that an employer cannot be required to litigate objections that are not contained in the Regional Director's Order. Due process and Board law limits the issues to those contained in the Order. *E.g. Rhone-Poulenc, Inc*., 271 NLRB 1008 (1984) and *Burns Security Services*, 256 NLRB 959 (1981). Thus, the Hearing Officer could consider his *sub silentio* added objection only if it was "reasonably encompassed" within Objection 2 *and* was fully and fairly litigated. *Precision Products Group*, 319 NLRB 640 (1995).

Yet, the Regional Director's Order Directing the Hearing makes no reference to the lack of a Spanish disclaimer. Moreover, at no point in the hearing did the Union ever raise the issue. (Tr: 1-734.)[21] *At no point in the hearing did the Hearing Officer ever alert Kindred that the presumed lack of a Spanish disclaimer was at issue*. *Id*. At no point in the hearing did Kindred address the presumed lack of a Spanish disclaimer. *Id*. Not a single word from the Regional Director, from the Union, from the Hearing Officer, or from Kindred concerning an issue that the Hearing Officer blithely asserts was "reasonably encompassed".

Moreover, this pattern is repeated in Kindred's post hearing brief. Kindred filed a 34-page brief that does not contain a single word referencing the disclaimer language on the sample ballot, or the lack of a Spanish version thereof. Given the detailed brief filed by Kindred, it is hardly likely that Kindred would have failed to address an issue it "knew" was in

[21] The fact that the Union never raised the issue at the hearing is particularly telling because throughout the hearing the Union repeatedly sought to raise new objections that had not been contained in the Regional Director's Order. Indeed, on the first day of the hearing, Union counsel flatly stated his intent to litigate unalleged objections. (Tr: 42.) The following day the Union made a formal motion to expand the objections. (Tr: 277-283.) Union counsel also made a formal offer of proof in support of his motion. (Tr: 284-288.) The Hearing Officer denied the motion. (Tr: 280-283.) Yet, at no point during its offer of proof (nor at any other time during the hearing) did the Union assert that Kindred's failure to post a Spanish disclaimer was objectionable conduct. The Union *first* raised the issue in its post-hearing brief to the Hearing Officer – hardly notice to Kindred that yet another new objection was being added.

dispute.

In his defensive anticipatory footnote ruling, the Hearing Officer does not reference any discussion that ever took place before or during the hearing putting Kindred on "notice" as to this issue.[22] An issue that no party, not even the Hearing Officer, referenced can hardly be said to be reasonably encompassed by an objection that also makes no reference to the altered sample ballot posted by Kindred.[23] As held by the Board in *Iowa Lamb Corporation*, 275

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[22] At least when the Union raised the issue *for the first time in its post-hearing brief*, the Union had the intellectual honesty not to assert that the issue was "reasonably encompassed" by the Objection or that it had been fully and fairly litigated. Quite to the contrary, the Union argued that its "additional objections" should be considered because "…the Hearing Officer and Regional Director have broad discretion to investigate and create a clear, fair and accurate report related to the Objections of any election and the preceding critical period leading up to an election." (Union Brief to Hearing Officer, p. 4.) While the Union is clearly wrong about the discretion available to the Regional Director and Hearing Officer, at least it argued honestly for the consideration of its additional objections.

[23] Strangely, the Hearing Officer relied on *Pacific Beach Hotel*, 342 NLRB 372 (2004), a case that contradicts his conclusion. In *Pacific Beach*, the Board found that an unalleged interrogation was "reasonably encompassed" (1) where both the Union and the Employer argued the issue in their post-hearing briefs; (2) where the Employer specifically argued that the conduct should not be found to be objectionable; (3) where witnesses were fully examined and cross-examined on the issue; and (4) where both parties understood that the conduct was still "at issue". *Id*. at 373. In comparison, *none of those factual circumstances are present here*, and for the Hearing Officer to rely on *Pacific Beach* to support his conclusion is nonsensical.

Equally strange, the Hearing Officer relied on general language in *Precision Products Group*, *supra*, to support his conclusion that he can consider a "reasonably encompassed" issue while simultaneously ignoring the holding of the case. The hearing officer in *Precision Products*, like the hearing officer here, concluded that the employer's statement that bargaining would start at "square one" was reasonably encompassed by an objection that the employer had unlawfully raised wage rates. The hearing officer also concluded that the employer had had a full opportunity to present evidence on the issue. The Board rejected both findings (a point that the Hearing Officer here conveniently ignores). Moreover, at least in *Precision Products*, the hearing officer had given the employer some indication *during the hearing* that the issue was being litigated when he overruled the employer's evidentiary objections to the issue stating: "…I do think it bears on the issue of the wage increase…" Nonetheless, the Board found the hearing officer's statement to be *insufficient notice*. Here, of course, the Hearing Officer gave Kindred no notice *of any kind*.

NLRB 185 (1985) in rejecting a similar effort by a hearing officer to expand the objections to encompass a new allegation.

> "The Petitioner did not allege that the statement was objectionable, the Regional Director did not identify it as an issue in his order directing hearing, and at the hearing, the hearing officer did not inform the parties he would consider it in his report. Further, based on our review of the record, we find that the issue was not fully litigated. We therefore conclude that the hearing officer erred in considering an issue that was not fully litigated and was wholly unrelated to the issues set for hearing."
>
> (footnote omitted.)

Indeed, the situation here is nearly identical to *FleetBoston Pavilion*, 333 NLRB 655 (2001). In *FleetBoston* the hearing officer found a "members only" contract to be objectionable conduct although it had not been alleged as an objection in the Regional Director's Order directing the hearing. The Board reversed noting (1) that the issue had not been alleged; and (2) that the hearing officer had not informed the parties at the hearing that he intended to consider the issue. Significantly, the Board also rejected the claim that the issue had been fairly litigated merely because some of the introduced evidence "peripherally touched" on the issue. *Id*. at 656. As the Board made clear, "…once the objections are at the hearing stage, the parties are entitled to fair notice of the matters that can serve as the basis for setting the election aside."

Kindred, of course, never had any type of notice that the presumed lack of a Spanish disclaimer might be used by the Hearing Office to invalidate the election. Because Kindred never had notice of this issue, Kindred never litigated the issue. Kindred never attempted to put on any type of defense because it had no knowledge that the existence of a Spanish language disclaimer was in issue. For the Hearing Officer to assert that the issue was "fully litigated" is simply untrue.

The *sum total* of the evidence on this subject comes from a few "throw away" questions asked by the Hearing Officer of Donald Whitney, a Human Resources Generalist employed at the hospital:

> Q. [Hearing Officer]: Okay. Are you aware of any other flyer similar to Union Exhibit 2 [an altered sample ballot in English] that does contain a ballot with Spanish language on it?
>
> A. I don't recall if we had a Spanish version, no.
>
> Q. All right. So there may be, or there may not be, but you cannot recall.
>
> A. I don't recall one, no.
>
> Q. All right. And let me ask you the same question about Union Exhibit 4 [another altered sample ballot in English], if you could look at that for a moment. And do you recall if there is – well let me ask you this. There is no Spanish language on Union Exhibit 4. Is that right?
>
> A. That is correct.
>
> Q. Okay. Are you aware of any other document similar to Union Exhibit 4 such as an official secret ballot such as this one in Union Exhibit 4 that does contain Spanish language?
>
> A. I don't recall one either.
>
> * * *
>
> Q. … Do you recall if there were any other flyers in Spanish that you saw at any time, whether pro or anti Union, anywhere in the facility after January 1, 2009.
>
> A. In Spanish?

Q. Yes.

A. I honestly don't recall.

Q. There may have been?

A. There could have been.

Q. Or there may not have been, yes.

A. There may not have been, yes.

(Tr: 566-567, 591-592.)[24]

Based on this limited testimony, the Hearing Officer asserts that the issue was fully and fairly litigated. The tangential testimonial reference, quoted above, does not constitute full and fair litigation. Indeed, that was the precise holding of *FleetBoston*, *supra*: "The fact that some evidence admitted in support of Objection 1 … and Objection 3 … may have peripherally touched on the hiring hall arrangement does not mean that the historic hiring hall relationship is "sufficiently related to the objections set for hearing…" 333 NLRB at 656. *See also Cedars-Sinai Medical Center*, 342 NLRB 596, 608 n. 32 (2004).

If the issue was fully and fairly litigated, where are the questions from Kindred either seeking to establish that a Spanish version disclaimer was posted or establishing an alternative defense. In *Foster Poultry Farms*, *supra*, the Board required that the altered ballot contain the necessary disclaimer in the various languages of the sample ballot. However, significantly, it was noted that there was no evidence that all of the eligible voters could speak and read English. 352 NLRB at 1150. It was also noted the employer had translated all of its campaign

[24] The fact that Donald Whitney could not recall whether a Spanish altered ballot was posted is not surprising. He played no role in the creation of the campaign material. He received the material, copied it, and posted it. (Tr. 429, 441-445.)

material into Spanish and Laotian – the two other languages on the NLRB sample ballot – but had chosen not to translate its altered ballot into either Spanish or Laotian. 352 NLRB at 1151.

Thus, if Kindred was on notice that the existence of a Spanish disclaimer was at issue, it had a number of options. *It could have set out to prove that it did post or otherwise distribute a Spanish version of the altered ballot*.[25] Alternatively, it might have adduced evidence that *all of its employees* spoke and read English. Indeed, what evidence does exist in the record indicates that all of the hospital employees were fluent in English. (Tr: 595, 597, 601-602, 705.) In further support of such a position, Kindred could have subpoenaed the ballots that were cast in the election to prove that not a single employee voted with a Spanish ballot. Kindred might also have shown that it did not produce any campaign material in Spanish and/or demonstrated that it never conducted a single campaign meeting in Spanish. These were all *possible* avenues of defense for Kindred, but Kindred was unable to avail itself of any of them because it had no notice that the Spanish disclaimer was at issue. Kindred put on no defense because it did not know a defense was necessary.[26] Clearly, the issue was not fully and fairly litigated. In truth, it was not litigated at all.

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[25] It should have been self-evident to the Hearing Officer that Kindred might have posted a Spanish version of the altered ballot at a location other than the time clock. Objection 2 focused on fliers posted in "proximity" to the time clock because it was that proximity that was the basis of the alleged objection. However, the bulletin board by the time clock had little space. For example, the Spanish version of the official NLRB poster was posted several yards away from the time clock although the English version was posted next to the time clock. (Tr: 447.) The official NLRB posters, in both English and Spanish, were posted in *three other locations*. (Tr: 445.) Kindred might have posted Spanish versions of its altered ballots at these locations but inasmuch as their existence was not relevant to Objection 2, *as alleged*, there would have been no reason for Kindred to have adduced this evidence. Alternatively, Kindred might have passed out copies of the Spanish version to some employees - again, a fact that Kindred had no need to adduce at the hearing in light of the wording of Objection 2. Based on this record, there is only speculation as to what Kindred did because the issue was not litigated.

[26] Even if the Board were to ultimately reject these defenses, a court of appeals might not. Accordingly, Kindred had a right to put on such evidence.

However, even assuming *arguendo* that the issue was litigated, then a review of the record evidence demonstrates that there is no evidence to support the Hearing Officer's conclusion that a Spanish disclaimer was not posted. A fair reading of the colloquy that occurred between the Hearing Officer and the witness (quoted above) shows that the witness simply did not know if a Spanish disclaimer had been posted. In point of fact, he could not recall whether *any* campaign material – whether pro-Union or anti-Union had been posted in Spanish. (Tr: 591-592.) Stated plainly, *he did not recall*. He did not say "No".

The Hearing Officer is not free to use the witness' failure to recall as *affirmative* evidence that the Spanish disclaimer was missing. There has to be evidence to support the finding that Kindred did not include a Spanish disclaimer. There is none in this record.

The Hearing Officer's re-cast Objection 2 cannot be sustained on any of four grounds:

- The issue is not reasonably encompassed within the alleged objections.
- The Hearing Officer never put Kindred on notice that the issue existed.
- The issue was not fully and fairly litigated.
- Regardless, there is a lack of record evidence concerning whether a Spanish language disclaimer was, or was not, included in Kindred's altered sample ballot, and therefore, there is insufficient evidence to support the Hearing Officer's conclusion.

Accordingly, the Hearing Officer erred in sustaining the objection, and in doing so, denied Kindred its due process rights in contravention of established Board law.[27]

[27] The Hearing Officer demonstrated the same disdain for Kindred's due process rights during the hearing. As noted, from the outset of the hearing, the Union unabashedly and repeatedly sought to litigate additional objections that were not set forth in the Regional Director's Order. (Tr: 39-45, 278-288, 291-293.) Although the Hearing Officer paid "lip service" to the Board rule precluding such litigation, in truth, he allowed the Union to put the evidence into the record over Kindred's objections. As a result, he forced Kindred to waive its cross-examination rights so that Kindred could not be charged with having fully and fairly litigated

IV. CONCLUSION

A fair election was conducted resulting in a 68 to 30 rejection of the Union. The two objections sustained by the Hearing Officer lack any substantive basis. Kindred did not threaten, either implicitly or explicitly, to close down its hospital if the employees selected the Union as their representative. The Hearing Officer's contrary conclusion with respect to Objection 1 is unsupported by the facts and the law and should be reversed. The Hearing Officer decision to sustain Objection 2 on a ground never alleged nor litigated must also be reversed as a violation of Board law and Kindred's due process rights. Alternatively, it must be reversed because the record is devoid of affirmative evidence demonstrating that Kindred failed to post a Spanish language disclaimer. According, the election results should be certified.

Dated: August 28, 2009

Respectfully Submitted

Kindred Healthcare, Inc.

_____s/_____

By: Henry F. Telfeian
Labor Relations Counsel

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unalleged objections. (Tr: 346-348.) Kindred also refused to produce a subpoenaed witness, and the Hearing Officer "threatened to take an "adverse inference". (Tr: 368-370, 374, 615.) As a result, Kindred filed a request for special appeal with the Board seeking to have the Board "strike" the irrelevant testimony and quash the subpoena. By Order dated July 16, 2009, the Board denied the request without prejudice to Kindred's raising the issues in its exceptions. However, when he issued his decision, the Hearing Officer did not pursue any of the objections that the Union sought to add at the hearing. Rather, the Hearing Officer adopted a Union objection that was first raised in the Union's post-hearing brief. Due process and Board law precluded the Hearing Officer from doing so.

PROOF OF SERVICE

STATE OF CALIFORNIA,
COUNTY OF SAN FRANCISCO

I am employed in the County of San Francisco, State of California. I am over the age of 18 and not a party to the within action; my business address is: 1388 Sutter Street, Suite 605 San Francisco, CA 94109.

On February 9, 2011, I served the document(s) described as

EMPLOYER'S BRIEF IN SUPPORT OF EXCEPTIONS TO HEARING OFFICER'S REPORT AND RECOMMENDATIONS TO CONDUCT AFFECTING RESULTS OF ELECTION

in this action by sending, via electronic mail, a true and correct copy to the email addresses known to me to belong to the below listed attorney, counsel for Petitioner, and on Johannes Lauterborn, Hearing Officer in this matter:

Shane Youtz, Esq..
Youtz & Valdez P.C.
900 Gold Ave. SW
Albuquerque, NM 87102

Johannes Lauterborn, Esq.
Hearing Officer
NLRB Region 28
2600 North Central Ave., Suite 1800
Phoenix, AZ 85004

[ ] (BY MAIL) I caused said envelope to be delivered overnight via the U.S. Postal Service express mail/overnight delivery service by depositing with the U.S. Postal Service on that same day with postage thereon fully prepaid at San Francisco, California. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in this declaration.

[xx] (VIA EMAIL) On this date I transmitted an electronic copy via email to the following email addresses: shane@youtzvaldez.com and Johannes.Lauterborn@nlrb.gov

[ ] (BY OVERNIGHT DELIVERY) I caused said envelope(s) to be delivered overnight via an overnight delivery service in lieu of delivery by mail to the addressee(s).

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed on February 9, 2011, at San Francisco, California.

_____s/_____

___

Henry F. Telfeian